No. 14716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS GARCIA,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization Service, Los Angeles, and U. L. PRESS, Officer in Charge,

Appellees.

BRIEF FOR APPELLEES.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ANDREW J. DAVIS,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules

Statutes

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Jurisdiction.

This appeal is taken from the Order of the District Court dismisisng appellant's "Petition For A Writ of Habeas Corpus" [Tr. 3-6] which was made and filed February 18, 1955 [Tr. 7].

This Court has jurisdiction of this appeal pursuant to the provisions of 28 U. S. C., Secs. 1291 and 2253, there being no dispute that the Order of the District Court dismissing appellant's Petition was a final Order.

Statutes Involved.

Section 360 of the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1503) reads as follows:

"§ 1503. Denial of rights and privileges as national—Proceedings for declaration of United States nationality.

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

Application for certificate of identity; appeal.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national

of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

Application for admission to United States under certificate of identity; revision of determination.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission

to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States. June 27, 1952, c. 477, Title III, ch. 3, § 360, 66 Stat. 273.

Title 28, § 2241 provides in part as follows:

(c) The Writ of Habeas Corpus shall not extend to a prisoner unless

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof;"

Statement of the Case.

The Petition for Writ of Habeas Corpus was filed by the appellant in the District Court on February 17, 1955 [Tr. 3-5] on the same date appellant presented to the Court a proposed Order to Show Cause which was not issued due to the fact that it appeared to the Court there was no jurisdiction for the action. On February 18, 1955, the District Judge filed an Order denying the Petition for a Writ of Habeas Corpus [Tr. 7] which recited that said Petition would be denied due to the fact that the appellant was not in custody as required by Title 28 U. S. C., Sec. 2241 *et seq.* Thereafter, appellant filed Notice of Appeal on February 28, 1955.

ARGUMENT.

I.

Summary.

Appellees contend that the Petition for Writ of Habeas Corpus filed by appellant disclosed that appellant was not in custody or detained by themselves or anyone under their authority. In fact, the Petition alleges that appellant was in Tijuana, Baja, California, Mexico, at the time the Petition was filed. Appellees contend further that habeas corpus proceedings will only apply when the petitioner is in custody and since appellant was not in custody, the Petition was properly dismissed.

Appellant claims that Congress has changed the requirements of habeas corpus proceedings by enacting Sections 360(b) and 360(c) of the Immigration and Nationality Act of 1952. The change, appellant contends, is that custody of the petitioner is no longer necessary. However, it does not appear that Congress contemplated any change in habeas corpus proceedings and that it intended that custody would still be required.

In this particular case, even if it were assumed for argument that custody was no longer necessary, the petition would still fail to allege the necessary jurisdictional facts to bring appellant within the jurisdiction of the District Court. The statute, Section 360(c) of the 1952 Act, requires that an application for a certificate of identity be made before a diplomatic or consular officer of the United States. If the application is denied, such denial may be appealed to the Secretary of State. If the application is granted the person then applies for admission to the United States. If he is denied admission by the Attorney General at that time, he may then initiate

habeas corpus proceedings to review the immigration proceedings. The Petition failed to allege that appellant had applied for a Certificate of Identity as required by the statute and therefore failed to allege the jurisdictional requirements. It is clear that appellant has not exhausted his administrative remedies.

II.

Appellant's Petition Disclosed That Appellant Was Not in Custody and Therefore Habeas Corpus Did Not Lie.

Paragraph II of the Petition [Tr. 3] recites in part as follows:

> "That petitioner is now in Tijuana, Baja, California, Mexico, and claims that he is still a citizen of the United States . . ."

This allegation clearly discloses that appellant was not in the United States and was not in the custody of any officer or official of the Government. The Order Denying Petition [Tr. 7] recites that the petitioner was not in custody and that the order to show cause would therefore be denied and the Petition dismissed.

Under the above circumstances, a writ of habeas corpus will not lie, since such a writ is designed solely to determine the legality of detention. Habeas corpus may not be sought to test the legality of detention at some future time.

Pope v. Huff (C. C. A., D. C., 1940), 117 F. 2d 779;

Rowland v. Arkansas (C. C. A. 8, 1950), 179 F. 2d 709;

28 U. S. C. 2241.

Without restraint of liberty the writ of habeas corpus will not issue.

McNally v. Hill, 293 U. S. 131, 138, 55 S. Ct. 24, 27, 79 L. Ed. 238;

Stalling v. Splain, 253 U. S. 399, 40 S. Ct. 537, 64 L. Ed. 940;

Johnson v. Boy, 227 U. S. 245, 33 S. Ct. 240, 57 L. Ed. 497;

Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277.

In the *Rowland* case, *supra,* the Court pointed out that the habeas corpus section, Section 2241 of Title 28, U. S. Code, requires "custody" in order for a Writ of Habeas Corpus to issue.

III.

The Allegations of Appellant's Petition Disclosed That the District Court Was Without Jurisdiction Under the Provisions of Section 360 of the Immigration and Nationality Act of 1952.

A. Section 360(c) of the Immigration and Nationality Act Does Not Confer Jurisdiction Upon the District Court in This Case as the Appellant Was Not in Custody.

Section 360(c) of the Act of 1952 is set forth above. The pertinent portion of the statute is quoted as follows:

> "A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise."

The appellant's Petition did not recite under what statute the action was brought. Apparently however, the Petition attempted to invoke jurisdiction under Section

360(c). The remedy provided in that section is by habeas corpus proceedings and not otherwise. Since there is nothing to indicate Congress intended to change the previously existing concept of habeas corpus requiring custody, the discussion above in reference to requirements for habeas corpus would apply.

Appellant claims that Congress can alter or change the common law concept of habeas corpus and that they in fact intended to do so when enacting Section 360(c). Appellant cites the cases of *D'Argento v. Dulles,* 113 Fed. Supp. 933; *United States v. Shaughnessy,* 118 Fed. Supp. 490, and *Nevarez v. Brownell,* 218 F. 2d 575, as supporting his contention.

In the *D'Argento* case the Court decided that the Immigration and Nationality Act of 1952 prevented a declaratory judgment action to determine nationality when a right or privilege as a national was denied outside the United States. The Court said at 113 Fed. Supp. 933, 935, that such actions were prevented:

> "except as such question, and those properly relating thereto, may be raised and adjudicated in a habeas corpus proceeding under the conditions stated in the statute;".

The Court did not indicate that the requirements of habeas corpus as to custody had been charged or that it had been the intent of Congress to change such requirements.

The case of *United States v. Shaughnessy, supra,* concerned a motion to dismiss a declaratory judgment action filed before the expiration of the Immigration and Nationality Act of 1940. The Court indicated that habeas corpus would be the plaintiff's only remedy under the

1952 Act but did not indicate that any different concept of habeas corpus was to be applied under the 1952 Act.

In *Nevarez v. Brownell, supra,* the Court held only that habeas corpus was the appropriate remedy but again did not indicate that any changes had been made in the previously existing concept of habeas corpus. The Court did not discuss the question of custody at all.

B. Appellant's Petition Failed to Allege That Administrative Remedies Had Been Exhausted.

There are no presumptions in favor of the jurisdiction of Courts of the United States. (*Grace v. American Central Ins. Co.,* 109 U. S. 278 (1883); *Ex parte Smith,* 94 U. S. 455 (1876).) One seeking the exercise of federal jurisdiction in his favor must allege in his pleading facts essential to show jurisdiction, and if he fails to make the necessary allegations, he has no standing in Court.

Rule 8(a)(1), Fed. Rules Civ. Proc., 28 U. S. C. A.;

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189 (1936);

Hanford v. Davis, 163 U. S. 273 (1896);

Engel v. Tribune Co., 189 F. 2d 177 (C. A. 7, 1951);

Joy v. Hague, 175 F. 2d 395 (C. A. 1, 1949), cert. den. 338 U. S. 870;

Alexander v. Westgate-Greenland Oil Co., 111 F. 2d 769, 770 (C. C. A. 9, 1940);

Royal Service Corp. v. City of Los Angeles, 98 F. 2d 551, 554 (C. C. A. 9, 1938).

The foregoing principle, well established in all cases where federal jurisdiction is claimed, applies to habeas corpus proceedings.

> *Dorsey v. Gill,* 148 F. 2d 857, cert. den. 65 S. Ct. 1580, 325 U. S. 890, 89 L. Ed. 2003 (App. D. C., 1945).

Appellant's Petition omitted jurisdictional allegations necessary to bring him within the purview of Section 360(c) of the Immigration and Nationality Act of 1952. The Petition contains no averment that he had ever applied for a Certificate of Identity as required by Sections 360(b) and 360(c) of the state. This is an administrative remedy which must be exhausted. Even assuming, *arguendo,* that Congress did intend to change the concept of habeas corpus requiring custody and detention, then the Petition still failed for want of jurisdiction due to the fact that it failed to aver the exhaustion of administrative remedies. Clearly, under the statute, application for a certificate of identity and the appeal of a denial of that application to the Secretary of State in the event if should be denied are jurisdictional conditions which must be alleged.

> *Meyers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938);
>
> *Samanrego v. Brownell,* 212 F. 2d 891 (C. C. A. 5, 1954);
>
> *Avina v. Brownell,* 112 Fed. Supp. 15 (D. C. Tex., 1953).

It is submitted therefore, that by reason of appellant's failure to include in his Petition the aforementioned allegations, the District Court did not acquire jurisdiction under the provisions of Section 360(c) of the Immigra-

tion and Nationality Act of 1952. Further, it was not necessary for a return to be filed before dismissal as the Petition itself revealed the defects described above. (*Higgins v. Steele,* 195 F. 2d 366 (C. A. 8, 1952); *Bowe v. Skeen,* 107 Fed. Supp. 879 (D. C. W. Va., 1952).)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court, dismissing appellant's Petition for a Writ of Habeas Corpus and Denying his Order to Show Cause, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ANDREW J. DAVIS,
Assistant U. S. Attorney,

Attorneys for Appellee.